

ORIGINAL

D.F.  
C/M

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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STACEY MANNING

Petitioner,  
-against-

**MEMORANDUM AND ORDER**  
Case No. CV-04-4095 (FB)

WILLIAM PHILLIPS, Superintendent,

Respondent.  
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*Appearances:*

*For the Petitioner:*

STACEY MANNING, *pro se*  
#01-A-2521  
Green Haven Correctional Facility  
Post Office Box 4000  
Stormville, NY 12582

*For the Respondent:*

RICHARD A. BROWN, ESQ.  
District Attorney, Queens County  
By: ELLEN C. ABBOT, ESQ.  
Assistant District Attorney  
125-01 Queens Boulevard  
Kew Gardens, New York 11415

**BLOCK, Senior District Judge:**

Petitioner Stacey Manning ("Manning") seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 following his conviction in New York Supreme Court, Queens County, on second-degree depraved indifference murder and first-degree intentional manslaughter charges in connection with a 1998 beating in which Manning repeatedly stomped and kicked a homeless man in the head; the man later died from his grievous injuries. In Manning's *habeas* petition,<sup>1</sup> he claims that (1) the depraved indifference murder and first-degree manslaughter counts should have been submitted in the alternative, and the jury

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<sup>1</sup>Manning moved for leave to amend his petition; the Court denied his motion. See Order of July 19, 2006.

verdict convicting him of both is inconsistent, and (2) he was deprived of his right to effective assistance of counsel; the Government concedes that these claims have been exhausted.

The facts of this case present a textbook example of a circumstance in which it is appropriate to conjunctively charge depraved indifference murder and first-degree manslaughter, as the evidence could easily support convictions for both crimes.<sup>2</sup> Manning, for no apparent reason, stomped on the head of a homeless man for several minutes, causing the man to suffer multiple hemorrhages, hematomas and contusions to the brain; in light of these acts, a jury could reasonably have concluded that Manning committed acts that both were “inten[d] to cause serious physical injury to another person” in violation of New York Penal Law § 120.20(1) and “recklessly . . . create[d] a grave risk of death to another person” in violation of New York Penal Law § 125.25(2). See *Sweet v. Bennett*, 353 F.3d 135 (2d Cir. 2003) (“The fact that [the perpetrator] was convicted of committing an act with the intent to cause physical injury. . . does not rule out the possibility that he also unintentionally (and recklessly) created a risk of . . . death.”). It was therefore proper to charge depraved indifference murder in tandem with intentional manslaughter, and

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<sup>2</sup>The Government contends that Manning’s inconsistency claim is barred from *habeas* review by an adequate and independent state procedural ground because the New York Appellate Division deemed that it was “not preserved for appellate review,” *People v. Manning*, 756 N.Y.S.2d 496, 496 (2d Dep’t 2003), and that Manning has failed to show (a) cause and prejudice or (b) that a fundamental miscarriage of justice will result if the Court does not consider his claim. See Mem. of Law in Opp. to Pet. for Writ of Habeas Corpus at 17-18. The Court agrees, but nevertheless decides the claim on the merits.

conviction on both charges does not present any inconsistency.<sup>3</sup>

Manning also claims that his counsel was ineffective because he failed to object when the trial court failed to charge depraved indifference murder and first-degree manslaughter in the alternative; as discussed, these charges were not inconsistent, and counsel's failure to object to the charge was, therefore, not unreasonable. Further, trial counsel was pursuing a wholesale acquittal on the theory that the Government's witnesses had not credibly identified Manning, and his decision not to request that the counts be charged in the alternative reflected a reasonable professional judgment that presenting alternative charges to the jury would weaken his misidentification defense. Manning's ineffective assistance claim thus fails the two-prong standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984): counsel's representation did not fall "below an objective standard of reasonableness . . . under prevailing professional norms," *Strickland*, 466 U.S. at 688; further, the overwhelming evidence against Manning negates any "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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<sup>3</sup>This is true under any view of depraved indifference murder: under the recklessness *mens rea* standard that was used when Manning's conviction was finalized, a reasonable juror could find that Manning recklessly created a grave risk of death; likewise, under the heightened depraved indifference *mens rea* standard articulated in the *Policano* line of cases (which in any event does not apply to Manning's conviction, see *Policano v. Herbert*, 7 N.Y.3d 588, 603 (N.Y. 2006) ("This raises the question whether our post-*Sanchez* case law applies retroactively. . . [w]e conclude that it does not.")), Manning's actions fall squarely within the fact pattern outlined in *People v. Suarez*, 6 N.Y.3d 202, 212 (N.Y. 2005) ("[T]he crime [of depraved indifference murder] is . . . established when a defendant - acting with a conscious objective not to kill but to harm - engages in . . . a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim.").

have been different." *Id.* at 694.

Manning's § 2254 motion is denied. Because Manning has failed to make a substantial showing of the denial of a federal right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253.

**SO ORDERED.**

s/Hon. Frederic Block

  
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FREDERIC BLOCK  
Senior United States District Judge

Brooklyn, New York  
December 14, 2007